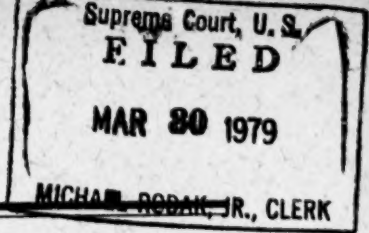


No. 78-1229



**In the Supreme Court of the United States**

**OCTOBER TERM, 1978**

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**A-OK MOTOR LINES, INC. (SAMUEL KAUFMAN,  
TRUSTEE IN BANKRUPTCY), PETITIONER**

**v.**

**NORTH ALABAMA EXPRESS, INC., ET AL.**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT**

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**MEMORANDUM FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION**

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1. Petitioner, a motor carrier that operated solely within Alabama, held a "certificate of registration" under former Section 206(a)(7)(A) of the Interstate Commerce Act, 49 U.S.C. 306(a)(7)(A), authorizing it to transport goods in interstate commerce incident to its intrastate authority.<sup>1</sup> It applied to the Interstate Commerce Commission for permission under Section 5(2) of the Act, 49 U.S.C. 5(2), to transfer portions of the authority evidenced by its certificate of registration to four multistate motor carriers. Carriers that operate in more

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<sup>1</sup>This Act was recently revised, codified, and enacted without substantive change as Subtitle IV of Title 49 of the United States Code. Pub. L. No. 95-473, 92 Stat. 1337. In order to be consistent with the petition and the decisions of the court below and the Commission, all references here will be to the Interstate Commerce Act prior to the new codification.

than one state cannot hold certificates of registration. 49 U.S.C. 306(a)(7)(A). Thus, these four carriers also filed applications under Section 207 of the Act, 49 U.S.C. 307, seeking certificates of public convenience and necessity authorizing them to provide the services previously provided under petitioner's certificate of registration.

Petitioner attempted to obtain approval from the Alabama Public Service Commission to transfer the underlying intrastate authority as well. Because Section 206(a)(7)(A) provides that a certificate of registration may not be transferred apart from the transfer of the corresponding intrastate certificate, the Interstate Commerce Commission refused to authorize the transfer of petitioner's interstate rights until the Alabama authorities determined that it could properly transfer its intrastate authority as well (Pet. App. A84-A85, A88). The Alabama Commission denied approval for the transfer of the intrastate rights, and the Alabama Supreme Court upheld that decision. *Alabama Public Service Commission v. Cooper Transfer Co., Inc.*, 295 Ala. 209, 326 So. 2d 283 (1975).

Petitioner then offered to ask the state authorities to cancel its underlying intrastate authority in order to avoid the prohibition in Section 206(a)(7)(A) against the transfer of a certificate of registration apart from the transfer of the corresponding intrastate rights. The Commission's Division 3 concluded that this proposed procedure was permissible under the statute. Because it had previously determined that the transaction was otherwise in the public interest and that the public convenience and necessity would be served by the transfer of the service to the four interstate carriers, Division 3 approved petitioner's application to transfer its interstate authority, subject to the Alabama Commission's cancelling petitioner's intrastate authority or petitioner's agreement not to use that authority to support future interstate operations. (Pet. App. A98-A106).

The court of appeals remanded the case to the Commission with instructions to vacate and set aside its order (Pet. App. A1-A20). The court found that by denying petitioner's request to transfer its intrastate rights, the Alabama authorities had made it impossible for the applicants to avoid the prohibition in Section 206(a)(7)(A) against the transfer of a certificate of registration apart from the transfer of the corresponding intrastate rights (Pet. App. A15). The court added that petitioner could not avoid that prohibition by cancelling its intrastate rights because, in the court's view, interstate authority under a certificate of registration cannot survive after the underlying intrastate authority is lost (Pet. App. A14; see also *id.* at A16). For that reason, the court held that petitioner's Section 5(2) application to transfer part of its operating authority could not be granted. Observing that under the Commission's Organization Minutes, Division 3 could consider only those applications for certificates of public convenience and necessity that are "directly related" to a Section 5(2) transfer application, the court held that Division 3 of the Commission exceeded its authority when it approved the purchasing carriers' "unrelated" applications (Pet. App. A16).

2. The ruling of the court of appeals with respect to the jurisdiction of Division 3 is consistent with the Commission's internal rules applicable at the time of the agency's decision.<sup>2</sup> Section 17(4) of the Act, 49 U.S.C. 17(4), provides, however, that any division may "act as to any work, business, or functions assigned or referred thereto under the provisions of this section, and with respect thereto shall have all the jurisdiction and powers conferred by law upon the Commission \* \* \*." Moreover, as this Court has noted, "[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the

<sup>2</sup>30 Fed. Reg. 11189, 11191 (1965).



orderly transaction of business before it when in a given case the ends of justice require it." *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970). Thus, the Commission's decision is not invalid because one division rather than another decided the case. In overturning the Commission's decision for this reason, the court of appeals was therefore in error.

Nonetheless, we do not urge that the petition be granted. The Commission is now reorganized into two divisions of general jurisdiction.<sup>3</sup> Either of the divisions now in existence would have authority to grant certificates of public convenience and necessity in a case such as this. Accordingly, this issue lacks any prospective significance and does not warrant review by this Court.

Moreover, none of the other questions raised by petitioner merits review. The court of appeals concluded that the cancellation of petitioner's intrastate authority terminated its incidental interstate authority and thus barred its transfer. It also held that the state agency's refusal to approve a transfer of the intrastate authority precluded compliance with Section 206(a)(7)(A) (Pet. App. A15).

These conclusions are not of significant importance to the administration of the Act. The circumstances of this case—an application for permission to transfer a certificate of registration, combined with a denial by state authorities of permission to transfer the corresponding intrastate authority—are unusual. Moreover, the court of appeals' decision does not deprive the Commission of the authority to grant certificates of public convenience and necessity, which are independent of the state's decision, when such cases occur.<sup>4</sup>

<sup>3</sup>42 Fed. Reg. 65181 (1977).

<sup>4</sup>The court of appeals' decision does not conflict with *County of Marin v. United States*, 356 U.S. 412 (1958), as petitioner asserts

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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(Pet. 12-14). In that case the Court recognized that the Commission's jurisdiction over all aspects of Section 5(2) transactions is "exclusive and plenary," but it was not considering the specific limitations imposed by Section 206(a)(7)(A), which was enacted four years later.